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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. [redacted] 49

BERNARD B. BAILEY,

Appellant

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT AS TO JURISDICTION

BERNARD B. BAILEY,
Pro Se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1081

BERNARD B. BAILEY,

Appellant

vs.

J. A. ANDERSON, STATE HIGHWAY COMMISSIONER OF VIRGINIA,

Appellee

JURISDICTIONAL STATEMENT

The petitioner, Bernard B. Bailey, respectfully presents herein a statement particularly disclosing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Appeals of Virginia, entered on the 22nd day of November, 1944, in the above entitled cause.

Statutory Provisions Believed to Sustain Jurisdiction of the Supreme Court of the United States

The statutory provisions believed to sustain jurisdiction of the Supreme Court of the United States are as follows:

Sec. 237(a) of the Judicial Code, as amended by Act of Feb. 13, 1925, c. 229; 43 Stat. 937; U. S. C. A. Tit. 28, Sec. 344(a);

Act approved Feb. 13, 1925, c. 229, Sec. 8(a); 43 Stat. 940; U. S. C. A. Tit. 28, Sec. 350;
Act approved January 31, 1928, c. 14; 45 Stat. 54; U. S. C. A. Tit. 28, Sec. 861a; as amended by Act of Apr. 26, 1928, c. 440; 45 Stat. 466; U. S. A. Tit. 28, Sec. 861b.

Statute of Virginia, the Validity of Which Is Involved

Virginia Acts 1922, c. 403, sec. 10, last paragraph, as amended by Acts 1940, c. 380, sections 4 and 6; Virginia Code 1942, sections 1969j(4), 1969j(6).

Section 1969j(4), Virginia Code 1942, provides as follows:

"In addition to the exercise of the power of eminent domain, as provided hereinabove, the commissioner is hereby authorized to enter upon and take possession of such property and rights of way, for the purposes set out in section 1969j(1), as the commissioner may deem necessary, and proceed with the construction of such highway. Within sixty days after the completion of the construction of such highway, if the commissioner and the owner or owners of such lands are unable to agree as to compensation and damages, if any, caused thereby, the said commissioner shall institute condemnation proceedings, as hereinbefore provided; and the amount of such compensation and damages, if any, awarded to the owner in such proceedings shall be paid out of the State highway fund, the said commissioner to pay to the landowner or into court, or to the clerk thereof, for his benefit such sum as he shall estimate to be the fair value of the land taken and damage done, before entering upon such land for construction purposes, provided such payment shall in no wise limit the amount to be allowed under proper proceedings. It is the intention of this section to provide that such property and rights of way may, in the discretion of the commissioner, be condemned after the construction of the highway, as well as prior thereto, and to direct the fund out of which the judgment of the court in condemnation proceedings shall be paid, and to provide that in all

other respects the provisions of this act shall apply, whether the property and rights of way are condemned before or after the construction of the highway, but the authorities constructing such highway under the authority of this section, shall use diligence to protect growing crops, pastures, and to prevent damage to any property not taken. So far as possible, all rights of way shall be acquired or contracted for, before any condemnation is resorted to."

Sec. 1969j(6), Virginia Code 1942, provides as follows:

"A certificate issued by the State Highway Commissioner and counter-signed by the Treasurer of Virginia, stating that any sum or sums of money designated therein will be paid pursuant to the order of any court or courts wherein the condemnation proceedings under the provisions of this act are pending, when filed with the said court or courts, shall be deemed and held for the purpose of this act to be payment into the custody of such court or courts. Payment against any such certificate so issued and countersigned, when ordered by the court or courts named therein, shall be paid by the Treasurer on warrants of the Comptroller, issued on vouchers signed by the State Highway Commissioner. A duplicate of each such certificate so issued and countersigned shall be kept as a record in the office of the State Highway Commissioner and a copy thereof shall be filed with the Treasurer of Virginia."

Date of Judgment of Supreme Court of Appeals of Virginia, and of Application for Appeal to the Supreme Court of the United States

Application for appeal is duly made within the period of three months after the entry of judgment, as required by 28 U. S. C. A., Section 350, in that the judgment of the Supreme Court of Appeals of Virginia sought to be reviewed was entered on November 22, 1944, and the petition for appeal was presented to and refused by the Honorable

Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia on February 12, 1945, as evidenced by his statement attached.

Nature of Case, and Rulings of the State Trial and Appellate Courts, and Cases Sustaining Jurisdiction of the Supreme Court of the United States

The petitioner presents below the nature of the case and the rulings of the Court, in order to show that they were such as to bring the case within the jurisdictional provisions relied on, citing the cases believed to sustain jurisdiction, and specifying the stage in the proceedings in the court of first instance and in the appellate court at which, and the manner in which the federal questions sought to be reviewed were raised, the method of raising them, and the way in which they were passed upon by the court, with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on the Supreme Court of the United States:

Validity of statute drawn in question, and decision in favor of validity. In condemnation proceedings instituted on June 17, 1943, in the Circuit Court of Fairfax County, Virginia, by the State Highway Commissioner of Virginia, an answer was filed on April 22, 1944, by the property owner, the petitioner herein, alleging in paragraph 5 thereof that the State Highway Commissioner, acting under the authority contained in said Sections 1969j(4) and 1969j(6), on October 15, 1941, "seized the land described in the petition and since that time has constructed a state highway thereon and has used the same for the travel of the public, which use is now being made of the land * * * that said

statute is in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States because it allows the petitioner to enter and construct the highway and mutilate and disfigure the property for highway purposes and at the same time restrains the owner from acting upon his own motion and from compelling the petitioner to act to have commissioners appointed to view the land before the mutilation and disfigurement are completed." It was expressly claimed in paragraph 6 of said answer that the owner, the petitioner herein, had been damaged by the operation of the unconstitutional feature of said statute and had the right to challenge its validity, in that from October 15, 1941, until June 17, 1943, he was restrained by said statute from applying to the court and from compelling the State Highway Commissioner to apply to the court for the appointment of commissioners, pursuant to the statute regulating the method of determining just compensation, "to go on the property and view the entire property, including the part taken and the residue, to determine the value of the entire property in its condition before it was mutilated and disfigured beyond recognition;" that during that period of time the State Highway Commissioner "so changed and disfigured the property, as hereinafter set forth in detail, as to make it impossible, when the petition was filed herein and at the present time, for commissioners appointed by the court pursuant to the statute regulating the method of determining just compensation, to go on the property and determine the value of the entire property as it existed before the petitioner changed and disfigured it; and since the damages to the residue of the property resulting from the highway construction is the difference between the fair market value of the property at the time the entry was made and the fair market value of the property after the construction of the highway it is impossible now and was impossible on

June 17, 1943, when the petition herein was filed, to obtain a fair and just appraisal of the damages to which the defendant is entitled." The answer then set forth in detail, in paragraphs 7 and 8, the nature and extent of the mutilation and disfigurement of the property, alleging in substance that before the mutilation the property contained grounds appropriate for the colonial character of the dwelling thereon, and a distinctive hill site appropriate for the erection of another dwelling, and that by immense excavations and fills the State Highway Commissioner completely wiped out these grounds and the hill site. It was alleged in paragraph 9 of said answer that "Because of this mutilation and disfigurement of the property, it is now impossible for commissioners appointed by the court to go on the property and visualize the condition and value of the property before the disfigurement. An inspection of the property in its present condition gives a false impression of the condition and value of it before the disfigurement and leads the viewer to believe that the property was much less valuable than it actually was. As a result, the defendant is unable to obtain adequate damages representing the difference between the value of the property before and the value after the disfigurement." On motion filed by the State Highway Commissioner to strike the answer, the Circuit Court, in an order appointing commissioners entered on June 9, 1944, expressly held that the statute assailed is not in violation of the due process clause of the Fourteenth Amendment, the language of the Court being as follows: "And the Court is of the further opinion that the Statutes of the State of Virginia, under which this proceeding was instituted and the land of the Defendant was taken are not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, and the Court so holds, to which ruling of the Court the Defendant, Bernard B. Bailey, excepts." In the final judgment of the Circuit

Court entered on August 11, 1944, it is recited that the defendant, Bernard B. Bailey, signified his intention of applying to the Supreme Court of Appeals of Virginia for a writ of error to the ruling of the Court made and entered on June 9, 1944, "that the statutes of the State of Virginia under which the land of the defendant was taken by the plaintiff are not in violation of the Fourteenth Amendment of the Federal Constitution," and the judgment was suspended for ninety days conditioned upon appeal bond being filed. After filing proper appeal bond, the defendant, Bernard B. Bailey, duly applied to the Supreme Court of Appeals of Virginia for a writ of error to review the judgment of the Circuit Court, one of the errors assigned being that the Circuit Court erred "in holding that the statute under which the property was taken (Acts 1940, ch. 380, p. 666, sections 4 and 6; Michie's Code, Supp. 1940, Sections 1969j(4) and 1969j(6) is not in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution." On November 22, 1944, an order was entered in the Supreme Court of Appeals of Virginia, reading as follows:

> "The petition of Bernard B. Bailey for a writ of error to a judgment rendered by the Circuit Court of Fairfax county on the 11th day of August, 1944, in a certain condemnation proceeding then therein depending wherein J. A. Anderson, State Highway Commissioner of Virginia, was plaintiff and said petitioner was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court."

No opinion was delivered by the Supreme Court of Appeals of Virginia, but it is plain that in affirming the judgment of the Circuit Court the decision of the Supreme

Court of Appeals was in favor of the validity of the statute in question.[1] Thus, there was drawn in question the validity of a statute of a State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

Judgment sought to be reviewed rendered by highest Court in Virginia in which decision could be had. The Supreme Court of Appeals is the highest Court in Virginia, and, while the Court rejected the petition for writ of error and refused the writ, the Court expressly affirmed the judgment of the Circuit Court. The judgment of the Supreme Court of Appeals is, therefore, the judgment of the highest Court of Virginia in which a decision in the suit could be had.[2]

Finality of judgment sought to be reviewed. The adjudication by the Supreme Court of Appeals of Virginia was final in its nature because if there should be an affirmance by the Supreme Court of the United States the Circuit Court of Fairfax County, Virginia, would have nothing to do but to execute the judgment it had already rendered.[3]

Claim for compensation for use of property, and ruling thereon. In paragraph 4 of said answer, filed in the condemnation proceedings in the Circuit Court of Fairfax County, Virginia, claim was made for "compensation for the use of the land described in the petition for highway purposes at the rate of $200.00 per month for each and every month the land has been and will be used for highway purposes from October 15, 1941, when the land was seized, until

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[1] Bragg v. Weaver, 251 U. S. 57, 58, 64 L. Ed. 135, 40 S. Ct. 62; Royster Guano Co. v. Virginia, 253 U. S. 412, 413, 64 L. Ed. 989, 40 S. Ct. 560.

[2] Norfolk and S. Turnpike Co. v. Virginia, 225 U. S. 264, 56 L. Ed. 1082, 32 S. Ct. 823; Royster Guano Co. v. Virginia, supra.

[3] Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73, 1 S. Ct. 15; Mower v. Fletcher, 114, U. S. 127, 29 L. Ed. 117, 5 S. Ct. 799; Clark v. Kansas City, 172 U. S. 334, 43 L. Ed. 467, 19 S. Ct. 207; Georgia Ry. & Power Co. v. Decatur, 262 U. S. 432, 67 L. Ed. 1065, 43 S. Ct. 613.

such date as the petitioner is enjoined from using the land prior to acquiring title thereto in a legal manner." The basis for this claim, set forth in paragraphs 5, 6, 7, 8, and 9 of said answer, is that the use of the property is without constitutional authority because it is based upon the said statute the validity of which was drawn in question. In paragraph 10 of said answer the defendant alleged "that to deny him compensation for the use already made of his property for highway purposes and to allow the petitioner to continue to use the property for such purposes before acquiring title thereto, which use is based entirely upon said unconstitutional statute, would operate to deprive the defendant of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Constitution of the United States." On said motion filed by the State Highway Commissioner to strike the answer, the Circuit Court, in said order appointing commissioners entered on June 9, 1944, made the following ruling, viz., "And the Court also being of the opinion that Paragraph No. 4 of the pleadings of Bernard B. Bailey which claims compensation for the use of the land in the sum of $200.00 per month is not a valid claim, and the Court doth order that this paragraph be stricken from the pleading of the said Bernard B. Bailey, to which ruling of the Court the Defendant, Bernard B. Bailey, excepts." In said final judgment of the Circuit Court entered on August 11, 1944, it is recited that the defendant, Bernard B. Bailey, signified his intention of applying to the Supreme Court of Appeals of Virginia for a writ of error to the ruling of the Court made and entered on June 9, 1944, "that paragraph four of the defendant's grounds of defense filed herein on April 22, 1944, which claimed compensation for the use of the land taken by the plaintiff for the highway is not a valid claim, and that said paragraph be stricken from the defendant's grounds of defense", and as heretofore stated

said judgment was suspended for ninety days conditioned upon appeal bond being filed, and after filing proper appeal bond, the defendant, Bernard B. Bailey, duly applied to the Supreme Court of Appeals of Virginia for a writ of error to review the judgment of the Circuit Court, one of the errors assigned being that the Circuit Court erred in denying said compensation for the use of the property, the assignment of error being in the following language, viz., "In denying compensation for the use of the property, the use being based upon said statute, the Court deprived plaintiff in error of his property without due process of law contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution." The Supreme Court of Appeals, by the aforementioned order entered on November 22, 1944, affirmed the judgment of the Circuit Court and thereby denied the claim for compensation for use of the property. Thus, a right under the Constitution of the United States to compensation for use of the property was expressly set up, the claim was denied, and, for the reasons hereinbefore stated the judgment of the Supreme Court of Appeals, denying the claim, was a final judgment by the highest Court in Virginia in which a decision could be had. The question of compensation for use of the property by a State authority is complementary to and inseparable from the question concerning the constitutionality of the statute assailed, since the contention is that the use is unauthorized because it is based upon the statute; and inasmuch as the statute was assailed as being repugnant to the Fourteenth Amendment it is believed that Section 237(a) of the Judicial Code, as amended, sustains jurisdiction upon appeal to review not only the ruling

sustaining the statute but also the ruling denying compensation for the use of the property.[4]

Claim for interest on damages awarded, and ruling thereon. In paragraph 3 of said answer filed in the condemnation proceedings in the Circuit Court of Fairfax County, the defendant, Bernard B. Bailey, claimed "interest at the lawful rate on the total amount awarded as compensation and damages from October 15, 1941, when the property herein was seized by the petitioner, until payment is made." In paragraph 4 of said motion to strike the answer, the State Highway Commissioner impliedly admitted that interest should be allowed from October 15, 1941, when the land was seized, until June 17, 1943 when the condemnation proceedings were instituted, but contended that no interest should be allowed during the period after June 17, 1943, in which the owner was "insisting that the condemnation proceedings be delayed until the termination of the injunction suit".[5] The claim for interest was not submitted to the commissioners. After the award by the commissioners of compensation and damages, the claim for interest was presented to the Circuit Court, as shown by the recital in the final judgment, reading as follows: "Whereupon, the defendant stated to the Court that no claim was being made for interest on the One Thousand Five Hundred Dollars ($1500.00), being the amount awarded in said report as compensation for the value of the land taken for the highway, and, in order to evidence that fact, the defendant moved the Court for permission to amend paragraph three of the defendant's grounds of defense, filed herein on April 22nd, 1944, so that said paragraph

[4] Prudential Insurance Co. of America v. Cheek, 259 U. S. 530, 547, 66 L. Ed. 1044, 42 S. Ct. 516; Fox River Paper Co. v. R. R. Com. of Wisconsin, 274 U. S. 651, 653, 71 L. Ed. 1279, 47 S. Ct. 669; Flourney v. Weiner, 321 U. S. 253, 754, 88 L. Ed. 478, 699.

[5] Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914.

would read as follows: 'The defendant claims interest at the lawful rate on the amount awarded as damages from October 15, 1941, when the property herein was seized by the petitioner, until payment is made.'" The judgment then recited that "After hearing argument of counsel for the parties the Court * * * being of the opinion that the defendant is not entitled to interest on the amount awarded by the Commissioners * * * it is, therefore, ordered and adjudged * * * (a) That the motion of the defendant, Bernard B. Bailey to amend his said grounds of defense in the manner aforesaid be, and the same is hereby denied, and to the action of the Court in denying said motion and disallowing said amendment the defendant by counsel excepted. (b) That the defendant's claim for interest on the $6500.00 from October 15, 1941, until payment, be and the same is hereby denied and to the Court's ruling in this respect the said defendant by counsel excepted." The final judgment ordered the State Highway Commissioner to deposit with the Clerk for the owner's benefit the sum of $8,000.00, being the total amount of the award for compensation and damages, and that this sum be paid by the Clerk in accordance with further orders of the Court and to bear interest at six per cent per annum from August 11, 1944, the date upon which judgment was entered, until paid, to which ruling exceptions were duly made. The deposit of $8,000.00 was made on August 19, 1944, pursuant to the order of the Court. In the aforesaid petition for writ of error filed in the Supreme Court of Appeals, one of the errors assigned was as follows: "In denying interest, from the time of entry on the property of plaintiff in error, on the amount awarded by the commissioners as damages, the Court allowed the taking of the property without just compensation in violation of Section 6 of the Virginia Constitution, and deprived plaintiff in error of his property without due process of law contrary to the due process

clause of the Fourteenth Amendment of the Federal Constitution." The Supreme Court of Appeals, by the aforementioned order entered on November 22, 1944, affirmed the judgment of the Circuit Court, and thereby denied the claim for interest on the amount awarded as damages from October 15, 1941, until payment is made. The federal question relating to interest on the amount awarded as damages was timely presented in the petition for writ of error filed in the Supreme Court of Appeals. It was not necessary to set up the federal question until the claim for interest had been denied, as the denial of interest could not have been anticipated.[6] The claim for interest was not denied until the Circuit Court ruled on the claim. Therefore, it was not necessary to set up the federal question until after the Circuit Court had ruled that interest would not be allowed.[7] Moreover, the Supreme Court of Appeals recited in said order that it had given mature consideration to the petition for writ of error, in which the federal question as to interest was expressly set up. Since the Supreme Court of Appeals expressly affirmed the judgment of the Circuit Court, and since the Circuit Court expressly denied the claim for interest, and this ruling was presented to the Supreme Court of Appeals as the basis for the federal question, the Supreme Court of Appeals necessarily held that the denial of interest did not violate the due process clause of the Fourteenth Amendment of the Federal Constitution. Since the Supreme Court of Appeals necessarily ruled on the federal question it is immaterial that the federal question was not raised in the Circuit Court.[8] Thus, a right under the Constitution of the United States to in-

[6] Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794.

[7] Johnson v. N. Y. Life Ins. Co., 187 U. S. 491, 495, 47 L. Ed. 273, 23 S. Ct. 194.

[8] Whitfield v. State of Ohio, 297 U. S. 431, 435-436, 80 L. Ed. 778, 56 S. Ct. 532.

terest on the amount awarded as damages was expressly set up, the claim was denied, and, for the reasons hereinbefore stated, the judgment of the Supreme Court of Appeals denying the claim was a final judgment by the highest Court in Virginia in which a decision could be had. While the ruling denying interest on the amount awarded as damages is not related to the question concerning the constitutionality of the statute assailed, it is believed that the ruling denying interest is reviewable on appeal because it is involved in the same cause in which the statute was upheld.[9]

Statement of Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Question concerning the statute assailed. Whether the Fourteenth Amendment prohibits a State from conferring upon a State agency the authority to seize and mutilate private property for a public purpose and to forestall and postpone until the mutilation has been completed the ascertainment by viewers of the market value of the property in its condition at the time of the seizure is a question which, it is believed, has not been decided by the Supreme Court of the United States, and is not foreclosed by principles enunciated in existing decisions. The question requires analysis and exposition for a decision.[10] There is no question concerning the right under a constitutional statute to take and mutilate private property in invitum without first instituting proceedings, even though the statute is silent as to the time or even as to the necessity for instituting pro-

[9] Prudential Ins. Co. of America v. Cheek, 259 U. S. 530, 547, 66 L. Ed. 1044, 42 S. Ct. 516; Flourney v. Weiner, 321 U. S. 253, 754, 88 L. Ed. 478, 699.

[10] Milhelm v. Moffat Tunnel Imp. Dist., 262 U. S. 710, 716, 717, 67 L. Ed. 1194, 43 S. Ct. 694.

ceedings.[11] The question is not whether the period of delay in instituting condemnation proceedings in this case was too long per se.[12] The precise question presented is whether the Fourteenth Amendment sanctions the seizure and mutilation of property under a State statute that vests in the party exercising the power of eminent domain the absolute and exclusive power to determine at what stage of the mutilation the trial court shall direct that the property be viewed by commissioners who, in determining compensation and damages, must ascertain the value of the property before it was mutilated,[13] and whose view of the property is the controlling factor in the determination of that value and outweighs the testimony given after the view has been made.[14] Laying aside the details, the question is whether the State, in acquiring private property by eminent domain, may impose upon the owner a procedure by which it is exceedingly difficult, if not impossible, for him to obtain and present the primary evidence upon which compensation and damages are to be awarded. This

[11] Bragg v. Weaver, supra; Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, 67 L. Ed. 1167, 43 S. Ct. 684.

[12] Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914, 916; cert. denied 321 U. S. 799, 88 L. Ed. 779, 64 S. Ct. 940.

[13] Ch. of Highway Com. v. Parker, 14. Va. 25, 136 S. E. 496, 498; Ch. of Highway Com. v. Fletcher, 153 Va. 43, 149 S. E. 456, 457; Long v. Shirley, 177 Va. 401, 14 S. E. (2) 375, 379.

[14] Cranford Paving Co. v. Baum, 97 Va. 501, 24 S. E. 906, 907; Richmond & P. Electric Co. v. Seaboard A. L. Ry., 102 Va. 399, 49 S. E. 512, 514; Hunter's Adm'r. v. C. & O. R. Co., 107 Va. 158, 59 S. E. 415, 419, 420, 17 L. R. A. (N.S.) 124; Barnes v. Tidewater Ry. Co., 107 Va. 263, 58 S. E. 594-596; Appalachian Power Co. v. Johnson, 137 Va. 12, 119 S. E. 253, 259; Duncan v. State H. Com'r., 142 Va. 135, 128 S. E. 546, 549, 550; Fonticello Mineral Springs v. City of Richmond, 147 Va. 355, 137 S. E. 458, 462; Hannah v. City of Roanoke, 148 Va. 554, 139 S. E. 303, 307; Shirley v. Russell, 149 Va. 658, 140 S. E. 816, 818; Shoemaker v. U. S., 147 U. S. 282, 304-306, 37 L. Ed. 170, 13 S. Ct. 361; Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547, 558-560, 54 L. Ed. 877, 30 S. Ct. 581; U. S. v. Wise, 131 Fed. (2) 851, 853. See also, Yeary v. Holbrook, 171 Va. 266, 198 S. E. 441, 445, 446.

is not a case of "dubious mistake in the appraisal of the evidence".[15] It is a case of withholding and destruction of the evidence by a State agency acting under the statute assailed. "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."[16] The Commonwealth of Virginia has authorized a procedure "in absolute disregard of the owner's right to just compensation"[17] and contrary to the Fourteenth Amendment, in that the owner must wait until the original condition of his property, which is the very basis upon which the amount of the award is determined, has been completely removed by the State Highway Commissioner from the view of the commissioners appointed by the Court to view the land. "Such a system of condemnation" is not even "fair upon its face".[18] The statute assailed does not provide for the owner such procedure in regard to the inspection of the property as is appropriate to the Virginia method for determining the amount of the compensation and damages.[19] It is recognized that in shaping procedure the State may exercise wide discretion and is not disturbed by the Fourteenth Amendment unless it "offends some principle so rooted in the traditions and conscience of our people as to be ranked as fundamental".[20] It is conceded that in the taking of property by eminent domain the owner has no fundamental right to have his property viewed by com-

[15] Roberts v. N. Y., 295 U. S. 264, 278, 79 L. Ed. 1429, 55 S. Ct. 689.

[16] West Ohio Gas Co. v. P. U. Com., 294 U. S. 63, 69, 79 L. Ed. 761, 55 S. Ct. 316.

[17] McCoy v. Union Elevated R. Co., 247 U. S. 354, 363, 62 L. Ed. 1156, 38 S. Ct. 504.

[18] Roberts v. N. Y., 295 U. S. 264, 277, 79 L. Ed. 1429, 55 S. Ct. 689.

[19] Davidson v. The Board of Administrators, 96 U. S. 97, 105, 105, 24 L. Ed. 616; Anderson Nat. Bank v. Luckett, 321 U. S. 233, 246, 88 L. Ed. 499, 64 S. Ct. 599.

[20] Snyder v. Mass., 291 U. S. 97, 105, 78 L. Ed. 674, 677, 678, 54 S. Ct. 330.

missioners either before or after mutilation of the property, or to have the compensation and damages assessed before the mutilation. The contention is that when the State statute in mandatory language provides, as in Virginia it does provide without any question, that the property must be viewed by commissioners appointed by the Court to fix the compensation and damages,[21] and when the highest Court in the State adopts the following rules (a) that the view by the commissioners is the controlling factor in the determination of the compensation and damages,[22] (b) that the commissioners shall fix the amount of the compensation for the property taken by ascertaining the market value of the property in its condition immediately before the taking, and (c) that in fixing the amount of the damages to the residue of the property the commissioners shall ascertain the amount that represents the difference between the market value of the residue in its condition immediately before the taking and the market value thereof in its condition immediately after the mutilation has been completed,[23] then under those particular

[21] "Proceedings for condemnation hereunder shall be instituted and conducted in the name of 'State Highway Commissioner' * * * Upon or after the filing of the petition as aforesaid, the Commissioner shall give ten days' notice * * * of his intention to apply to the proper court or judge * * * for the appointment of commissioners to ascertain what will be a just compensation for the land * * * proposed to be condemned for such uses and to award the damages, if any, resulting to the adjacent or other property of the owner * * * from the construction and operation of the highway * * *. Upon the selection of the commissioners, the court, or the judge thereof in vacation, shall direct them, in the custody of the sheriff or one of his deputies * * * to view the land described in the petition with the landowner and the State Highway Commissioner, or any representative of either party being allowed to be present and none other, unless otherwise directed by the court; and upon motion of either party, the judge shall accompany the commissioners upon their view of the land. Upon the completion of the view, the court or the judge in vacation, shall hear the testimony in open court on the issues joined * * *." Section 4969(2), Virginia Code 1942.

[22] Cases cited in note 14, supra.

[23] Cases cited in note 13, supra.

conditions, in order to have a hearing that is "full and candid," [24] the owner has a fundamental right to have his property viewed before it has been disfigured by the mutilation to such an extent that the condition of the property immediately before the taking is not apparent to the commissioners when they view the property; and the procedure should be such as is appropriate for safeguarding this right. A substantial federal question is presented, in that the statute assailed expressly removes from the procedure the owner's opportunity to safeguard this right; and no real opportunity to protect against an inadequate assessment of the compensation and damages is afforded to the owner by the allowance of testimony before the commissioners after they have viewed the property in its mutilated condition. [25] Presence of the owner at the viewing of the property bears only a "shadowy relation" [26] to the amount to be awarded; but when the amount to be awarded as compensation and damages is based primarily upon the value of the property in its original condition, and is measured and controlled primarily by impressions made upon the commissioners when they view the property, the "inevitable effect" of which is "that of evidence", then for the owner the viewing of the property by the commissioners before the original condition thereof has been removed through mutilation bears "relation, reasonably substantial to the fulness of his opportunity" to establish the amount of the just compensation and damages to which he is en-

[24] Roberts v. N. Y. 295 U. S. 264, 278, 79 L. Ed. 1429, 55 S. Ct. 689.

[25] Saunders v. Shaw, 244 U. S. 317, 319, 61 L. Ed. 1163, 37 S. Ct. 638; Bragg v. Weaver, supra; Joslin Mfg. Co. v. City of Providence, supra; Brinkerhoff-Faris T. & S. Co. v. Hill, 281 U. S. 673, 682, 74 L. Ed. 1107, 50 S. Ct. 451; American Surety Co. v. Baldwin, 287 U. S. 156, 168, 77 L. Ed. 231, 53 S. Ct. 98; Snyder v. Mass., 291 U. S. 97, 116, 121, 78 L. Ed. 674, 54 S. Ct. 330; Morgan v. U. S., 298 U. S. 468, 480, 80 L. Ed. 1288, 56 S. Ct. 906; Ohio Bell Tel. Co. v. Public U. Com., 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 57 S. Ct. 724.

[26] Snyder v. Mass., 291 U. S. 97, 108.

titled.[27] If in *Snyder* v. *Massachusetts* the gas pumps had been material items in Snyder's defense, and if the Commonwealth of Massachusetts had permitted the District Attorney to remove the pumps from the scene before the jury made the view, undoubtedly the accused would have been deprived of a right "ranked as fundamental", even though the accused had been afforded every opportunity to introduce at the trial, after the jury had made the view, evidence to show the condition of the premises before the District Attorney, in the exercise of his "discretion", removed the pumps from the view of the jury. The act of removal would have been considered as "an act of tyranny".[28] There is no more reason for allowing the State Highway Commissioner of Virginia to remove and destroy material evidence, in the exercise of his "discretion", than there would have been for allowing the District Attorney to remove the gas pumps. The arbitrary withholding of material evidence is just as intolerable in civil as it is in criminal proceedings, particularly where, as in the Virginia condemnation procedure,[29] the determination of those to whom the evidence would be submitted "exacts and receives a proper deference from courts".[30] There is no necessity for injecting into the condemnation procedure impediments in the form of administrative discretion, which may destroy material evidence and may coerce the owner. The administrative discretion of the State Highway Commissioner of Virginia may be appropriately exercised in matters of highway construction, but his discretion is "perverted from its proper function" when it is injected

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[27] Snyder v. Mass., 291 U. S. 97, 105, 106, 121.

[28] Snyder v. Mass., 291 U. S. 97, 117, 78 L. Ed. 674, 54 S. Ct. 330.

[29] Cases cited in note 14, supra.

[30] Ohio Bell Tel. Co. v. Public U. Com., 301 U. S. 292, 304, 81 L. Ed. 1093, 57 S. Ct. 724.

into matters of procedural due process and used to frustrate a fundamental right and to oppress one who is subjected to its control.[31] In the seizure and mutilation of the property in this case, the procedure of the statute assailed was imposed upon the owner to the fullest extent, and the necessary result was to deprive him of his property without just compensation. The original condition of the property and of the residue of the owner's property was removed from the view of the commissioners by the deliberate act of the State Highway Commissioner of Virginia in holding off the viewing of the property until he completed the mutilation, rendering it impossible for the commissioners to view the property in its original condition.[32] As a result of the disfigurement of the property the commissioners were led to believe that the property in its original condition was much less valuable than

[31] Dissent in Reed v. Allen, 286 U. S. 191, 209, 76 L. Ed. 1054, 52 S. Ct. 532. The compensation mandate of the 5th Amendment guards against an oppressive rule under which the Federal Government by manipulating "the form of its proceeding," mutilates the property interest, and "chops it into bits." (U. S. v. Gen. Motors Corp., No. 76, October Term, 1944, 89 L. Ed. 379, 384, 385.) Likewise, the due process clause of the 14th Amendment should guard against an oppressive rule under which a State agency manipulates the time for instituting the proceeding and meanwhile "chops" and disfigures the property. (Cases cited in note 36, supra.)

[32] The State Highway Commissioner of Virginia did not deny the allegations in paragraphs 7 and 8 of the answer which set forth in detail the condition of the property before and after the mutilation. That the commissioners appointed in condemnation proceedings can not view the property after drastic changes have been made and thereby determine the value of the property before the changes were made was clearly recognized by the Supreme Court of Appeals of Virginia in Hunter's Adm'r. v. C. & O. R. Co., 107 Va. 158, 59 S. E. 415, 419, 17 L.R.A. (N.S.) 124, where the Court said that "it was about five years after their report was made * * * before the commissioners were called upon to state the grounds of their award, and this after all vestige of the property condemned had been destroyed and the grounds * * * appropriated for railroad purposes, rendering another view of Hunter's property as it was when taken impossible." See also Lorillard Co. v. Clay, 127 Va. 734, 104 S. E. 384, 387 (view after 18 months delay).

it actually was.[33] The compensation and damages awarded by the commissioners were $10,200 less than the amount claimed by the owner, who of all those participating in the proceedings was the only one who was thoroughly familiar with the property in its condition immediately before the taking.[34] The coercive power bestowed by the statute assailed was openly and defiantly asserted against the owner in an attempt to force him to settle for an amount which was approximately one-ninth of the amount which he claimed in his answer, one-fourth of the amount awarded by the commissioners, and two-thirds of the amount which the Senior Highway Engineer stated at the hearing to be due.[35]

Question of compensation for use of property. The owner's right to compensation for the use of his property, the use being based entirely upon the statute assailed, presents a substantial federal question, in that (a) the due process clause of the Fourteenth Amendment of the Constitution of the United States prohibits a State from taking and using private property without paying just compensa-

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[33] An allegation to this effect in paragraph 9 of the answer was not denied, the State Highway Commissioner of Virginia asserting in paragraph 9 of his motion to strike merely that the commissioners could go on the property and "visualize the conditions and value of the property and award just compensation," thus admitting that the conditions to be visualized were those existing after the disfigurement.

[34] For the property taken the owner claimed $3,700 (par. 1 of answer), and the amount awarded was $1,500. For damages to the residue the owner claimed $14,500 (pp. 139, 149, 150, 153-156 of transcript of testimony), and the amount awarded was $6,500.

[35] The Senior Highway Engineer, T. W. Ross, testified that the amount offered the owner before the mutilation was too low and should have been fifty per cent higher (pp. 92, 100, 101, 102 of transcript of testimony; also p. 172, owner's undisputed testimony of warning that rejection of offer would result in mutilation and delay).

tion therefor,[36] (b) just compensation must be paid for the unauthorized use of property by one who is authorized to acquire it by eminent domain,[37] and (c) since the use in this case is based upon the statute assailed the use is unauthorized if the statute is unconstitutional.[38] The void ab initio theory applies because there is no ground in this case for the application of estoppel or of the de facto theory or of any of the other theories that have been advanced to justify acts founded upon an unconstitutional enactment.[39] There are no "particular relations" in this case, no "particular conduct", no "Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application."[40] The State Highway Commissioner of Virginia deliberately imposed the nefarious procedure permitted by the statute assailed, in defiance of the owner's objections and of the injunction suit brought by the owner in which he promptly and persistently resisted the mutilation of the property, expressly

[36] Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 246, 41 L. Ed. 979, 988, 17 S. Ct. 581; A. Backus Jr. & Sons v. Fort Street Union Depot Co., 169, U. S. 557, 565, 42 L. Ed. 853, 857, 18 S. Ct. 445; Appleby v. Buffalo, 221 U. S. 524, 532, 55 L. Ed. 838, 842, 31 S. Ct. 699; McGovern v. New York, 229 U. S. 363, 370, 57 L. Ed. 1228, 33 S. Ct. 876, 46 L.R.A. (N.S.) 391; McCoy v. Union Elevated R. Co., 247 U. S. 354, 363, 365, 62 L. Ed. 1156, 38 S. Ct. 504; Dohany v. Rogers, 281 U. S. 362, 366, 74 L. Ed. 904, 50 S. Ct. 299; Roberts v. N. Y., 295 U. S. 264, 79 L. Ed. 1429, 55 S. Ct. 689.

[37] Hustead v. Barron, 75 Fed. (2) 169, 170; Fletcher v. Delaware L. & W. R. Co., 79 Fed. (2) 306, 310; Evalyn Bldg. Corp. v. City of New York, 257 N. Y. 501, 178 N. E. 771, 773; Carter v. Town of Pearisburg, 173 Va. 346, 4 S. E. (2) 428, 429.

[38] Norton v. Shelby County, 118 U. S. 425, 442, 30 L. Ed. 178, 6 S. Ct. 1121; Chicago, etc., R. Co. v. Hackett, 228 U. S. 559, 566, 57 L. Ed. 966, 33 S. Ct. 581; Nichols v. City of Cleveland, 247 Fed. 731 (certiorari denied, 246 U. S. 668, 62 L. Ed. 930, 38 S. Ct. 336).

[39] Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371, 374, 84 L. Ed. 329, 60 S. Ct. 317.

[40] Ibid.

claiming that the statute violates due process,[41] and also in the face of a decision of the highest Court in the State of West Virginia, in which the Court denounced and declared unconstitutional a companion statute designed to give the State Highway Department of West Virginia the same control of the condemnation procedure.[42]

Question of interest on damages awarded. The ruling denying the claim for interest on the amount awarded as damages presents a substantial federal question in that (a) where a State Court adopts a rule which operates to deprive the owner of just compensation the owner is deprived of his property without due process of law contrary to the Fourteenth Amendment of the Constitution of the United States,[43] and (b) where the property is taken and mutilated and damage is thereby caused to the residue of the owner's property, a ruling denying interest from the time of taking on the amount subsequently awarded as damages operates to deprive the owner of just compensation, in the absence of circumstances showing that the owner alone was responsible for the delay in payment.[44] The State Highway Commissioner of Virginia has admitted that the owner was not responsible for the delay from October 15, 1941, when the property was seized, until June 17, 1943, when the condemnation proceedings were instituted, a pe-

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[41] Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914, 916 (cert. den., 321 U. S. 799, 88 L. Ed. 779, 64 S. Ct. 940).

[42] McGibson v. Roane Co. Court, 95 W. Va. 338, 121 S. E. 99.

[43] Cases cited in note 36, supra.

[44] Jacobs v. U. S., 290 U. S. 13, 78 L. Ed. 142, 54 S. Ct. 26, 96 A. L. R. 1; U. S. v. Southern States, 33 F. Supp. 519, 118 Fed. (2) 79 (reversed on other grounds, 319 U. S. 266, 87 L. Ed. 1390, 63 S. Ct. 1047); Schnull v. Indianapolis Union R. Co., 190 Ind. 572, 131 N. E. 51; Pet. of State Highway Com'r v. Morrison, 279 Mich. 285, 271 N. W. 760; Alloway v. City of Nashville, 88 Tenn. 510, 13 S. W. 123.

riod of twenty months.[45] From April 22, 1944, when the owner filed his answer in the condemnation proceedings, until August 11, 1944, when final judgment was entered by the Circuit Court of Fairfax County, Virginia, a period of approximately four months, the delay was due to the time required for the pleadings, argument, hearing, and the preparation and entry of final judgment in the condemnation proceedings, and it has never been contended by the State Highway Commissioner of Virginia that the owner was responsible for that delay or that the owner should not have interest for that period of time. Thus the State Highway Commissioner conceded that the owner is entitled to interest for a period of approximately two years, from October 15, 1941, until June 17, 1943, and from April 22, 1944, until August 11, 1944; yet the Court, ignoring this concession and without citing any basis whatever, refused to allow interest for any period of time prior to the final judgment. This error of the Court was "gross and obvious, coming close to the boundary of arbitrary action."[46] The

[45] The Attorney General of Virginia, in his brief filed in Bailey v. Anderson, supra, stated that after completion of the highway the condemnation proceedings were instituted, and that at the instance of the owner the proceedings were held up pending a decision by the Supreme Court of Appeals of Virginia in the injunction suit, and then he stated that "it is to be noted that the postponement of the actual acquisition of title to the land is no longer due to the action of the State Highway Commissioner, but to the action of the appellant." (Statement of Attorney General exhibited on pages 67 and 68 of appendix to petition for certiorari and brief in No. 829, October Term, 1943.) In paragraph 4 of the motion to strike filed by the State Highway Commissioner in the condemnation proceedings, he stated that "a substantial part of the delay in the payment of compensation has been the result of the action of Bernard B. Bailey in insisting that the condemnation proceedings be delayed until the termination of the injunction suit," and that the defendant is not entitled to any interest for "such portion of the delay which has been the result of his own actions," and that "so much of paragraph 3 of said pleading of Bernard B. Bailey which claims interest for such period which resulted from the delay caused by Bernard B. Bailey, be stricken from said pleading and record."

[46] Roberts v. New York, 295 U. S. 264, 277, 79 L. Ed. 1429, 55 S. Ct. 689.

delay in the condemnation proceedings for approximately nine months, from June 17, 1943, when the proceedings were instituted, until March 20, 1944, when the State Highway Commissioner of Virginia moved for the appointment of commissioners, occurred during the pendency in the Supreme Court of Appeals of Virginia of the owner's injunction suit in which he sought to enjoin the destruction of the operation of his grist mill by the construction of the highway, and attacked the statute under which the property was seized, the same statute that is now assailed. It is not disputed, however, that the owner and the State Highway Commissioner agreed to postpone the condemnation proceedings during that time,[47] and it has never been contended by the State Highway Commissioner that the owner agreed that during that time he would not claim interest on the damages to be awarded in the condemnation proceedings.[48] The State Highway Commissioner was not compelled by the Court, certainly not by the owner, to delay the proceedings. The State Highway Commissioner could have insisted that the proceedings be carried out pending the injunction suit, just as he did insist on March 20, 1944, when he moved the Court to appoint commissioners in the condemnation proceedings while the owner was seeking a review upon certiorari by the Supreme Court of the United States of the decision of the Supreme Court of Appeals of Virginia in the injunction suit. The election of the State

[47] "By consent of both sides such condemnation proceedings were delayed in the lower court pending the determination by us, in the present appeal, of the right of the State Highway Commissioner to condemn the property in question." Bailey v. Anderson, 182 Va. 70, 27 S. E. (2) 914, 916. While the owner contended that this statement does not reflect the real issues before the Supreme Court of Appeals, the statement that the State Highway Commissioner consented to the postponement of the condemnation proceedings can not be disputed.

[48] There is no ground for an implied waiver of interest. The Court will not "presume acquiescence in the loss of fundamental rights." Ohio Bell T. Co. v. P. U. C. of Ohio, 301 U. S. 292, 307.

Highway Commissioner to postpone the condemnation proceedings from June 17, 1943, until March 20, 1944, is no ground for denying interest to the owner on the damages which were withheld from the owner during that time.[49] Finally, the deposit made by the State Highway Commissioner under the statute assailed was not effective to stop interest on the amount deposited, if the statute is held to be unconstitutional;[50] and the deposit made on August 19, 1944, pursuant to the order of the Court, was not effective to stop interest if in this petition for appeal the owner is successful.[51]

Respectfully submitted,

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pro se.

[49] Bloom, S. & G. v. Mitchell, 289 Mass. 376, 194 N. E. 114; Borst v. Young, 302 Mass. 124, 18 N. E. (2) 544.

[50] Norton v. Shelby County, supra; Chicago, etc. R. Co. v. Hackett, supra.

[51] Schnull v. Indianapolis U. R. Co., supra.